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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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COUNTER QUESTIONS PRESENTED

1. Where a federal appeals court with expertise in Puerto Rico civil law interprets and applies Puerto Rico's statutory tolling law to employment discrimination suits brought pursuant to 42 U.S.C. § 1983 and Puerto Rico law, should this Court defer to the interpretation of Puerto Rico statutory tolling law by the federal appeals court?

2. Where federal plaintiffs prevail on their claims of employment discrimination brought under both 42 U.S.C. § 1983 and Puerto Rico law, and where the tolling issue decided in their favor and the judgment as a whole can be upheld under Puerto Rico statutory tolling law as applied to the pendent Puerto Rico claims, should this Court exercise its certiorari jurisdiction to review a different tolling issue?

3. Where a federal district court finds as a factual matter for limitations purposes that a plaintiff in an employment discrimination suit received official notice of his demotion on a certain date and is therefore not time-barred, and where a federal appeals court in affirming this finding concludes that there was sufficient evidence on the record to sustain it, should this Court in the exercise of its certiorari jurisdiction further review this finding of fact?

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

STATUTORY PROVISIONS INVOLVED

18 L.P.R.A. § 249(e) (Puerto Rico)

The School authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status.

31 L.P.R.A. § 5303 (Puerto Rico)

Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor and by any act of acknowledgement of the debt by the debtor.

COUNTER STATEMENT OF THE CASE

The thirty-seven Respondents and others similarly situated, totalling ninety-one, filed suit on June 19, 1978, pursuant to 42 U.S.C. § 1983 and 18 L.P.R.A. 249 (e), as part of a proposed class action against certain high officials (Chardon and Ramos, Petitioners) in the Department of Education of the Commonwealth of Puerto Rico alleging political discrimination in employment. On the basis of numerosity the District Court denied class certification on August 21, 1978. After denial of class certification, there were filed (i) a Motion for Reconsideration which was denied on September 29, 1978; (ii) an Amended Complaint naming all ninety-one Plaintiffs which was denied on November 24, 1978; and (iii) a Motion for Reconsideration which was denied on December 11, 1978. The ninety-one Plaintiffs then filed separate complaints. After lengthy and protracted proceedings, fifty-five of them ("*Fumero Soto*" Plaintiffs) proceeded to a consolidated jury trial on liability alone on January 26, 1981. After a five day trial a unanimous jury found the Petitioners liable for political discrimination. Chardon and Ramos appealed to the First Circuit.

In the meantime, thirty-six other Plaintiffs ("*Fernandez*" Plaintiffs) had their complaints dismissed by the district court as time-barred under the applicable Puerto Rico one year statutes of limitation. These dismissals were reversed by the First Circuit on appeal in *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981) wherein *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) was distinguished from the *Fernandez* cases. However, this Court granted certiorari and summarily reversed in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (three Justices dissenting), holding that *Ricks* was indistinguishable.

The *Fumero Soto* cases and the *Fernandez* cases (on remand from this Court) were heard and decided on consolidated appeal. After various petitions for rehearing and modification of judgment were considered, the Court of Appeals for the First Circuit in the fifty-five *Fumero Soto* cases affirmed the liability judgment in favor of thirty-seven Plaintiffs, Respondents herein, who had received letters of prospective dismissal or demotion on or after June 17, 1977 and reversed the judgment of eighteen Plaintiffs who had received letters of dismissal or demotion before June 17, 1977. Petitioners' Appendix, 37a. Additionally, the Court of Appeals held that all thirty-six Plaintiffs in the *Fernandez* cases were time-barred, having received their letters of dismissal or demotion before June 17, 1977.

As to *all* of the Plaintiffs, the Court of Appeals ruled that this Court's limitations decision in *Delaware State College* v. *Ricks*, *supra*, should be retroactively applied. The Court of Appeals also held under Puerto Rico statutory tolling law, 31 L.P.R.A. section 5303, that a class action asserting a section 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew. Petitioners' Appendix 18a.

Petitioners have filed a Petition for Writ of Certiorari in this Court asking it to review this latter tolling issue. The thirty-seven Respondents and the other fifty-four Plaintiffs, all as Cross-Petitioners, have separately filed a timely Conditional Cross-Petition in which they ask this Court conditionally to grant certiorari and review the *Ricks* retroactivity issue in the event it decides to review the tolling issue raised by Petitioners. The thirty-seven

Respondents herein also file this Brief in Opposition to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Properly Applied Relevant Decisions Of This Court When It Held That Respondents' 42 U.S.C. § 1983 Actions Were Not Time-Barred Under Puerto Rico Substantive Tolling Law As Set Out In 31 L.P.R.A. Section 5303.

In *Board of Regents* v. *Tomanio* 446 U.S. 478 (1980), this Court held that state tolling law alone governs limitations periods in section 1983 cases. Interpreting 42 U.S.C. § 1988[1] and applying New York's tolling law, this Court rejected the Second Circuit's federal tolling rule which the latter court had considered justified "in the interest of advancing the goals of federalism." This Court said:

> ". . . Under the reasoning of these decisions [*Robertson* v. *Wegmann*, 436 U.S. 584 (1978), *Johnson* v. *REA*, 421 U.S. 454 (1975) and *Monroe* v. *Pape*, 365 U.S. 167 (1961)], the federal courts were obligated to apply not only the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations.

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[1] 42 U.S.C. § 1988 provides in relevant part that the jurisdiction of the district courts for the protection of civil rights

"shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court . . .is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

> Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal courts under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action . . . ." 446 U.S. at ____.

In these cases, the First Circuit properly followed *Tomanio* when it applied Puerto Rico substantive tolling law to these suits. This tolling law, 31 L.P.R.A. section 5303, reads as follows:

> "Prescription of actions is interrupted *by their institution before the courts*, by extrajudicial claim of the creditor and by any act of acknowledgement of the debt by the debtor." (emphasis added).

What is important to recognize at the outset, as the First Circuit did, and as explained next, is that under section 5303, the applicable limitations period is not simply suspended but *begins to run anew.*

The First Circuit correctly ruled under section 5303 that when the proposed class action was filed on June 19, 1978—the institution of an action "before the courts"—the one-year Puerto Rico limitations period stopped running for all members of the class. Petitioners' Appendix 16A - 17a. Thus, in *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (1966) the Supreme Court of Puerto Rico held that for a judicial claim to interrupt the prescription of the action, it is not necessary to serve the summons together with the complaint; mere filing interrupts. And in *Moa* v. *Commonwealth*, 100 P.R.R. 572, 589 (1972), the Puerto Rico Supreme Court stated:

> "[T]he mere effective filing of a complaint before a court within the period of prescription . . . produces the interruptive effect of the extinctive prescription of the action exercised, regardless of the vicissitudes

> that may arise subsequent to the filing of the complaint . . ."

Moreover, the filing of a suit, even though subsequently dismissed upon motion for nonsuit, interrupts prescription, *Parrilla* v. *Loiza Sugar Co.*, 52 P.R.R. 232 (1937), as does a complaint filed in a court without jurisdiction to entertain it. *Diez* v. *Green*, 32 P.R.R. 749 (1924); *Josefa Duran Cepeda* v. *Ismael Morales Lebron*, ____ P.R.R. ____ (P.R. S.Ct., April 14, 1982), Appendix herein 1a. Similarly, as the First Circuit held, the filing of the class action tolled the one-year limitations period under Puerto Rico law even though the class was ultimately denied certification.

Once the class was denied certification in August, 1978, the one-year limitations period began to run anew, as the First Circuit ruled under Puerto Rico law. Petitioners' Appendix 17a-18a. That is, under Section 5303, in contrast to the common law tolling approach of merely suspending the running of a statute of limitations, *a new limitations period began when the class was denied certification. Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (1934) (the limitation period "must be counted anew"); *DeJesus* v. *DeJesus*, 37 P.R.R. 143 (1927) ("[I]t becomes evident that the prescription of the action was interrupted by the mere act of filing the complaint and that interruption has for its effects that the time for the prescription must be computed anew.") See also *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (1966) where the Puerto Rico Supreme Court said in connection with interruption by judicial claim:

> "[T]he new period begins to run from the time that the litigation action, the commencement of which interrupted the period, ends."

To the same effect is *Josefa Duran Cepeda* v. *Ismael Morales Lebron*, ____ P.R.R. ____ (P.R. S.Ct., April 14, 1982), Appendix herein 1a.

Consequently, when the class was denied certification in August, 1978 the one year limitations period began to run anew and the Respondents, because they filed their individual suits within that year, were not time-barred under Puerto Rico law. Petitioners' contrary argument in their Petition in effect asks this Court to overrule *Board of Regents* v. *Tomanio*, *supra*.

The Petitioners' reliance on *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) is misplaced. There is no conflict between the First Circuit's decision and *American Pipe*. The tolling rule applied in *American Pipe* by this Court was a judge-made federal tolling rule developed in the context of the applicable federal tolling statute for anti-trust actions. 414 U.S. at 558-561. That different tolling rules apply to different federal actions is evident from this Court's quote in *American Pipe* from the Advisory Committee's Note for Proposed Rule 23 as follows:

> "Whether the intervenors in the non-class action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be decided by reference to the *laws governing . . . limitations as they apply in particular contexts.*"
>
> Id. at 554. (emphasis added)

Thus, because these cases involve § 1983, they are governed by Puerto Rico substantive tolling law pursuant to *Tomanio*, as the First Circuit concluded.[2]

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[2] The purportedly supportive cases footnoted by Petitioners at pp. 9-10 n. 10 of their Petition are for the most part distinguishable either

That the First Circuit's decision applying Puerto Rico substantive statutory tolling law is sound is also supported by this Court's decisions in *Carlson* v. *Green*, 446 U.S. 14 (1980) and *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). In *Carlson*, this Court applied a uniform judge-made federal rule of survivorship to a *Bivens* action against federal officials. It went on to emphasize, however, that *Bivens* actions are different in this respect from § 1983 actions because 42 U.S.C. § 1988, as interpreted in *Robertson*, requires that a forum state's survivorship law must be applied to § 1983 actions. Similarly, in light of § 1988 as interpreted and applied in *Tomanio*, Puerto Rico's substantive statutory tolling law, section 5303, applies to § 1983 actions.

Respondents emphasize the uniqueness of Puerto Rico's civil law-based substantive tolling law which begins the running of the applicable Puerto Rico limitations period anew and which is in marked contrast with common law tolling that simply suspends.[3] Several observations must be made in this regard. Unlike § 1983 which has no statute of limitations and no statutory tolling law of its own, it is significant that the anti-trust statute of limitations involved in *American Pipe* explicitly provided for *suspension* of that period during the pendency of any United States anti-trust proceeding. In these cases, how-

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as involving federal statutes of limitations, as pre-*Tomanio* decisions, or as not otherwise inconsistent with the First Circuits decision here.

[3] As the First Circuit stated in these cases: "Puerto Rico has not adopted the American common law, however, and we see no reason not to apply its running-anew rule to unnamed plaintiffs." Petitioners' Appendix 18a.

ever, because § 1983 has no statute of limitations and no tolling law, Puerto Rico statutory tolling law must be applied, as the First Circuit properly held.

Furthermore, because it regularly reviews decisions of Puerto Rico federal district courts, the First Circuit has developed considerable expertise in, and a "feel" for, Puerto Rico civil law. This Court has recognized that Puerto Rico "is a Spanish-Speaking Commonwealth with a set of laws still impregnated with the Spanish tradition" *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42-43 (1970) and that "[w]hen we contemplate such a system from the outside it seems like a wall of stone . . ." *Bonet* v. *Texas Co.*, 308 U.S. 463, 470 n. 17 (1940) (quoting Justice Holmes). The First Circuit is similarly well aware of the importance of Puerto Rico's Spanish civil law tradition in connection with the interpretation and application of Puerto Rico law. *Pagan Torres* v. *Negron Ramos*, 578 F.2d 11 (1st Cir. 1978). Indeed, in these very cases the First Circuit emphasized its familiarity with Puerto Rico law, and especially the Puerto Rico tolling statute involved here, section 5303, when it refused either to reconsider its earlier decisions dealing with a related tolling issue,[4] or to certify that issue to the Puerto Rico Supreme Court. Petitioners' Appendix 24a-26a.

The First Circuit's sensitivity to Puerto Rico civil law in these cases is entirely justified in light of repeated statements to the same effect by the Puerto Rico Su-

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[4] Whether certain protest letters sent by Respondents and others to the Petitioners constituted "extrajudicial claims" within the meaning of section 5303 so as to toll the applicable Puerto Rico one-year limitations period.

preme Court. For example, in *Justo Valle* v. *American International Insurance Corp.*, ____ P.R.R. ____ (P.R. S.Ct., May 22, 1979), that court asserted:

> "Nowadays, it seems unnecessary to reiterate that, in Puerto Rico, the law in the field of damages is governed—both in form and content—by the civil law system." (Translation), Appendix herein 18a.

See also Manuel Febo Ortega v. *Superior Court*, ____ P.R.R. (P.R. S.Ct., September 10, 1974) (tolling should be decided under Civil Code, *not* "under institutions extraneous to said Code, thus accelerating its erosion and mongrelization") (Translation), Appendix herein 24a, *and Hector Gierbolini Rivera* v. *Employers Fire Insurance Company*, ____ P.R.R. ____ (P.R. S.Ct., May 18, 1976) ("damages issues cannot be solved behind the back of the civil doctrine applicable") (Translation), Appendix herein 10a.

Consequently, the First Circuit's interpretation and application of Puerto Rico substantive tolling law in section 5303 are entitled to great respect and should be deferred to in these cases. Petitioners' attempts to characterize that interpretation and application as "novel and unprecedented" must be rejected.

II. The First Circuit's Decision On The Tolling Issue And The Judgment As A Whole, Supported By A Jury Verdict Of Liability Which Is Unchallenged By Petitioners In This Court, Can Be Upheld On Puerto Rico Law Grounds Related To The Pendent Puerto Rico Statutory Claims Asserted In These Cases.

The Plaintiffs in these cases joined to their § 1983 claims certain pendent Puerto Rico claims based on 18 L.P.R.A. section 249(e). Section 249(e) remained throughout, and still remains in, these proceedings both at the trial level and on review. Further, the jury was

instructed as to these pendent claims and returned a general verdict of liability. Surely as to these pendent Puerto Rico claims—Respondents do not concede for a moment, of course, that any tolling law other than Puerto Rico's should apply to their § 1983 claims—Puerto Rico substantive tolling law governs regardless of the § 1983 claims.

18 L.P.R.A. section 249(e) reads as follows:

> "The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed, and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignments, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status."

That Petitioners were properly sued under this statute is clear from *Muriel* v. *Suazo*, 72 P.R.R. 348, 353 (1951), where the Puerto Rico Supreme Court held:

> "[A] statute for the protection of civil rights, although a penal statute, does not bar a right of action for civil damages, for where the statute imposes upon any person a specific duty for the protection and benefit of others, his neglect to perform such duty creates a liability for any resulting injury."

See also 31 L.P.R.A. section 5141 which sets out the obligations of Petitioners for damages caused by their fault:

> "Sec. 5141. Obligation when damage caused by fault or negligence.
>
> A person who by an act or omission causes damage to another through fault or negligence, shall be obliged to repair the damage so done. Concurrent

> imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity. Civil Code, 1830, Sec. 1802, June 9, 1956; No. 28, p. 86, eff. June 9, 1956."

31 L.P.R.A. section 5303, with its provision for interruption by judicial claim, clearly controls tolling of the applicable one year limitations period for these pendent section 249(e) claims. Under Puerto Rico precedents, as discussed earlier, when the proposed class action was filed on June 19, 1978, the one year limitations period stopped running. However, once the class was denied certification in August, 1978, the limitations period began to run anew for the section 249(e) claims. Thus, the First Circuit's decision on tolling and the judgment as a whole can be upheld on Puerto Rico law grounds relating to these pendent section 249(e) claims alone. Reaching out to address the § 1983-related tolling issue which Petitioners attempt to raise would therefore make no difference in the outcome of these cases.

III. Ortiz Rivera's Complaint Was Timely Filed, As Found By The District Court And Affirmed By The First Circuit.

Petitioners strain mightily to create a conflict—which does not in fact exist—between the First Circuit's decision as to Ortiz Rivera and this Court's decision in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981). In the latter case, this Court summarily held, relying on *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), that the § 1983 causes of action of similarly situated employment discrimination plaintiffs accrued when they received their official letters of demotion, even though their demotions became effective later.

Here, the district court determined as a finding of fact and after considering all relevant evidence, that Ortiz

Rivera was officially notified by letter on June 21, 1977 of his prospective demotion. *See* Petitioners' Appendix, 78a-79a. It was on this date that his § 1983 cause of action accrued.

Thereafter, the First Circuit reviewed this finding of fact in light of the entire record and affirmed it as based on ample evidence. It stated:

> "We rule that, *as with all the other plaintiffs*, the statute of limitations started to run as to Ortiz Rivera on the day he received the official letter of demotion, which was on June 21, 1977. The class action was, therefore, timely filed." Petitioners' Appendix 5a-6a.

There is simply no reason for this Court to review this finding of fact, fully supported by the evidence and not clearly erroneous, F.R.C.P. 52(a), yet another time.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.[5]

Respectfully submitted,

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[5] However, in the event this Court should grant the Petition, Respondents and others as Cross-Petitioners ask this Court in a separately and timely filed Conditional Cross-Petition to review the *Ricks* retroactivity issue present in these cases. *See* Counter Statement of the Case at page 3 herein.

IN THE SUPREME COURT OF PUERTO RICO

No. 0-81-479

(Translation)

JOSEFA DURAN CEPEDA.,
Plaintiffs-petitioners,

v.

ISMAEL MORALES LEBRON *et. al.*,
Defendants-respondents.

CERTIORARI

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, April 14, 1982

On February 8, 1978, a motor vehicle belonging to the Commonwealth of Puerto Rico and insured by Universal Insurance Co. ("Universal") caused the death of the mother and grandmother of plaintiffs-petitioners, who are Dominican citizens.

On September 1, 1978, petitioners filed an action for damages before the United States District Court for the District of Puerto Rico. Summons were served on Universal and the Commonwealth on March 30, 1979.

On April 11, 1979, the federal court dismissed the action against the Commonwealth for lack of jurisdiction, and on November 29, 1979, it did the same as to Universal. It reconsidered, and reaffirmed its position in its opinion and order of August 1, 1980.

On June 13, 1980, petitioners filed their complaint before the Superior Court of Puerto Rico. On June 9, 1981, the court dismissed the action on the grounds that it was barred by the statute of limitations. We agreed to review.

Article 1873 of the Civil Code, 31 L.P.R.A. § 5303, sets down the ways in which the statute of limitations may be tolled:

> Prescription of actions is interrupted* by their institution before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgment of the debt by the debtor.

Article 1845 of the Civil Code, 31 L.P.R.A. § 5266, included in the chapter referring to *usucapio*, provides:

> Civil interruption is caused by a judicial citation of the possessor, even should it be by order of a court or of a judge without jurisdiction.

What is the meaning of the phrase "institutiton before the courts", as used in art. 1873? Does it refer to the filing of a complaint before a court without jurisdiction or venue ("competencia")? For purposes of this article, when is an action instituted before the courts, when it is filed or when the defendant is summoned? What is the relation, if any, between arts. 1873 and 1845? When an action is dismissed, does a new period of limitations start to run or does the previous one continue running? These are the basic questions raised in this action.

Petitioners and Universal are the only ones affected by the elucidation of these questions. Any way we look at it, the action against the commonwealth was time-barred. When petitioners filed this action with the Superior Court, more than a year had alapsed since the action against the Commonwealth had been dismissed. Consequently, the decision under review should be affirmed as to the Commonwealth.

In *Diez* v. *Green et al.*, 32 P.R.R. 749 (1924), this Court had before its consideration a controversy identical to the present one between Universal and the petitioners. There we held that

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[* Translator's note: Although the official translation of the Civil Code refers to "Prescription of actions is interrupted" (art. 1873) or to "Civil interruption" (art. 1845), we have chosen to use the more common phrase "tolling of the statute of limitations.]

the institution of an action before a court without jurisdiction, in that case the federal court, too, tolled the statute of limitations under the article then corresponding to art. 1873.

We have also held that the filing of a complaint—and not the service of summons—tolls the statute of limitations. *Feliciano* v. *A.S.A.*, 93 P.R.R. 638 (1966); *Barrientos* v. *Gov. of the Capital*, 97 P.R.R. 539 (1969); *Moa* v. *Commonwealth*, 100 P.R.R. 572 (1972). In *Feliciano* we held, at 643:

> . . . our civil law tradition requires a converse solution, [to the demand that notice of the complaint be served as a requirement for the tolling of the statute] for the acknowledged principle of interruption is the unmistakable manifestation of one, who threatened with the loss of his right, expresses his wish not to lose it.

In *Moa* we stated, at 589:

> [T]he mere effective filing of a complaint before a court, within the period of prescription . . . produces the interruptive effect of the extinctive prescription of the action exercised, regardless of the vicissitudes that may arise subsequent to the filing of the complaint, like, for example, when the court to which appeal has been taken lacks jurisdiction to take cognizance of the action or when the claim is dismissed by means of a motion of nonsuit.

We have also held that the tolling effect of a judicial action lasts until the action filed comes to an end. *Moa*, at 589; *Widow of Carlo* v. *Toro*, 99 P.R.R. 196, 221 (1970). It is then that its new period of limitation begins to run. *Feliciano*, at 644.

The aforecited case law would suffice to decide the questions raised. However, the learned trial court's decision as to the contrary, and the importance of the issues raised, some of which are still being debated in other jurisdictions, prompt us to consider them anew.

Articles 1845 and 1873 of our Civil code are modeled after articles 1945 and 1973 of the Spanish Civil Code of 1888. These, in turn, are derived from several sources. Article 1945 is identical to art. 1984 of Florencio Garcia Goyena's draft code of

1851. Article 1984 of said draft code, however, was part of a separate chapter, applicable both to *usucapio* and to limitation of actions. This provision, on the other hand, derived from art. 2246 of the Code Napoleon, which went back to an ancient French custom contrary to Roman law. F. Garcia Goyena, *Concordancia, Motivos y Comentarios del Codigo Civil Espanol* 1019 (Zaragoza 1974, reprint of 1852 ed.).

The precedent most directly related to art. 1973 of the Spanish Civil Code is art. 2244 of the French Civil Code, except that the acknowledgment of the tolling effect of the *out-of-court* claim is strictly Spanish. *Third Partida*, Title 29, Law 29. For a study of the ancient roots of limitation of actions in Spanish law, see: 3 F. Sanchez Roman, *Estudios de Derecho Civil* 265 *et seq.* (2d ed. 1891) (Madrid); Fuenmayor, *La interrupcion judicial de la prescripcion extintiva civil en el derecho navarro*, 27 Anuario de Derecho Civil 3 (1974); I J. Garceran de Vall y Souza, *La Prescripcion Extintiva en el Derecho General Privado* 217 *et seq.* (J. Montero ed.)(Havana 1944).

Since the Spanish Civil Code is unusually silent on whether a judicial claim before a judge without venue ("competencia") tolls the statute of limitations, the question has been meticulously studied by the doctrine. The overwhelming majority of commentators arrives at the same conclusion we reached in *Diez* v. *Green*, *supra:* The action before the courts, even if they do not have jurisdiction or venue ("competencia") has the effect of tolling the statute of limitations. L. Diez Picazo, *La Prescripcion en el Codigo Civil* 111, 122 (Ed. Bosch)(Barcelona 1964); 1-1 J. Puig Brutau, *Fundamentos de Derecho Civil* 898-899 (Ed. Bosch) (Barcelona 1979); 1-2 M. Albaladejo, *Derecho Civil* 472 (Ed. Bosch) (Barcelona, 3d ed. 1975); Albaladejo *Comentario al Articulo 1973 del Codigo Civil*, 1977 Rev. de Der. Privado 987-994; J. L. Lacruz Berdejo, *Elementos de Derecho Civil* 301 (Bosch) (Barcelona 1974); *contra:* XXXII-2 Q.M. Scaevola, *Codigo Civil* 959 *et seq.* (Ed. Reus) (Madrid 1965).

The Spanish doctrine generally applied by analogy the rule established in art. 1945 to the limitation of actions that is the

object of art. 1973. Diez Picazo, *op. cit.* at 122, explains the basic foundation for the analogy:

> Our Code, which to a great extent follows Comparative Law on this point, admist, however that a complaint filed before a judge without venue effectively tolls the statute of limitations. The reason is clear. The will of the owner or of the record holder to assert his rights becomes evident from the time the complaint is filed . . . Thus, it does not seem right or fair that he may take advantage of a possible error as to the venue ("competencia") of the entity where the complaint is filed.

See: I D. Espin Canovas, *Manual de Derecho Civil Espanol* 467-68 (Ed. Rev. de Der. Privado) (Madrid 1975).

In Spanish law, the work "*competencia*" (venue) includes, within the context we are discussing here, the meaning accorded to said term in our Law, as well as the meaning of the concept jurisdiction, whether over the subject matter or over the person. Diez Picazo, *loc. cit.* This is the same in French law. 12 C. Aubry, *Droit Civil Francais* 466 (Librairies Techniques) (7th ed. 1961) (Paris).

Beginning with Manresa, Spanish civil law sustains, as in our decision in *Feliciano* and in later cases, that in the case of the statute of limitations, the mere filing of the complaint has a tolling effect. It is *usucapio* that is not interrupted until the summons is served. XII J. Manresa, *Comentarios al Codigo Civil Espanol* 1235 (Ed. Reus) (6th ed. 1973) (Madrid); Fuenmayor, *ante* at 11, 14.

In its approach, Spanish law also coincides with our position in *Feliciano*, at 644, where we held that a whole new term begins to run at the termination of an action whose institution tolled the statute of limitations. Puig Brutau, *op. cit.* 896; Albaladejo, *Derecho Civil*, *op. cit.* at 466; Diez Picazo, *op. cit.* at 128.

The steadfast rule in French law is that a judicial claim tolls the statute of limitations, and *usucapio*, even if brought before a court without venue ("competence") II-1 F. Marty and P. Raynaud, *Droit Civil* 872 (Sirey) (Paris 1962); C. Aubry, *loc.*

cit.; Baudry-Lacantinerie & Tissier, "Prescription" (translated by J. Mayda), 5 *Civil Law Translations* 249 (West Publishing Co.) (St. Paul 1972); 7 Fuzier-Herman, *Code Civil Annote* 960 (Sirey) (Paris 1948); Encyclopedia Dalloz, *Prescription Civil* 450 *et seq.*, par. 167; Civ. March 5, 1957, D. 1957, 334; 3-2 Mazeaud and Mazeaud, *Lecciones de Derecho Civil* 420 (Ed. Juridicas de Europa-America) (Buenos Aires 1960). The same rule applies in France when the action is improperly filed before a foreign court. Civ. January 21, 1975, D. 1975, *Inf. rap.* 83.

Other civil law jurisdictions generally follow the doctrine prevailing in Puerto Rico on the tolling effect of a complaint filed before a court without venue ("competencia"). This is the rule in effect in Italy: A Scialoja and G. Branca, *Commentario del Codice Civile* 260, Book 6, arts. 2910-2969 (Soc. Editora del Foro Italiano) (Rome 1972); Cass. July 7, 1947; G. Pescatore and C. Ruperto, *Codice Civile* 2880, n. 9 (Giuffre, ed.) (Milan 1978); in Germany: art. 212, BGB; in Switzerland: arts. 135(2) and 139 of the Code on Obligations; in Portuga;: *Codigo Civil de 1966*, art. 323, subsection 1; in Argentina: 1-3 A. G. Spota, *Tratado de Derecho Civil* 365-66 (Ed. Roque Depalma) (Buenos Aires 1959); M. A. Argaranas, *La Prescripcion Extintiva* 103-04 (Ed. Argentina) (Buenos Aires 1966). It surely did not go unnoticed that several of the aforementioned countries, like Puerto Rico, have a dual court system. In some, like Germany and Switzerland, the period of limitation of actions is shorter.

In the absence of a statute, United States common law has generally favored a rule that is the opposite of the civil law one. At present, however, most states have passed legislation recognizing the tolling effect of defective judicial claims. Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1243 (1950); Comment, *The Tolling of the Statute of Limitations When a Case has been Previously Dismissed for Lack of Jurisdiction or for Improper Venue*, 7 Univ. of Richmond L. Rev. 319 (1972); Note: *Limitations of Actions:*

Statutes Permitting New Action within One Year after Reversal Held Applicable to Nonsuit, 33 Calif. L. Rev. 453 (1945). In some cases, even when the statute does not cover situations where the complaint is filed before a court without jurisdiction or venue, ("competencia") the law has been broadly construed and the improper judicial claim has been accorded a tolling effect. Pieper, *The Illinois Savings Statute: An Analysis of Section 24a of Chapter 83*, 9 John Marshall Journal of Practice and Procedure 465, 474 *et seq.* (1976).

Although this case is governed by the civil law, it would be interesting to see, from the point of view of comparative law, how some U.S. courts have handled this problem. In *Roth* v. *Northern Assurance Company*, 203 N.E.2d 415 (Ill. 1964), the situation was identical to the one at bar. The state court held that the action filed before a federal court without jurisdiction tolled the statute of limitations. The opposite situation was considered in *Sachs* v. *Ohio National Life Insurance Co.*, 131 F.2d 134 (7th Cir. 1942). The first complaint was filed before a state court without jurisdiction. The United States Court of Appeals for the Seventh Circuit held that said complaint was not time-barred. In that same vein, Comment, *supra*, 7 Univ. of Richmond L. Rev. 319, 324 (1972). *Contra: United States* v. *Continental Casualty Co.*, 354 F.Supp. 1353 (D.P.R. 1972). It has also been held that a complaint filed before a foreign court without jurisdiction has a tolling effect. *Cook* v. *Britt*, 290 N.E.2d 908 (Ill. 1972). The reason for these statutory and case law rules, which are similar to those controlling in most civil law countries, was thus explained by Justice Holmes in *New York Central & H. Railroad Co.* v. *Kinney*, 260 U.S. 340, 346 (1922):

> Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.

To conclude, we reafirm our decisions in *Diez*, *Feliciano*, *Moa*, and other cases cited. The complaint filed before a court

without jurisdiction or venue ("competencia") tolls the statute of limitations from the time it is instituted and, when the first court enters a final and unappealable judgment, a new term begins to run. Since the facts do not warrant it, the discussion of possible exceptions to this rule has no place in this opinion.[1] Neither should we probe into the relevant provisions of the Commerce Code. Particularly see art. 941 of said Code, 10 L.P.R.A. § 1903.

For the foregoing reasons, *the dismissal of the complaint as to the Commonwealth will be affirmed, the judgment as to Universal Insurance Co., will be reversed and the case shall be remanded for further proceedings not inconsistent with this opinion.*

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[1] For cases where the rule is abused or used in bad faith, see: F. de Castro y Bravo, *Temas de Derecho Civil* 161, n. 1 (Madrid 1972). For situations where the plaintiff voluntarily asks for dismissal of his suit, see: *Gonzalez* v. *The San Juan L. & T. Co.*, 17 P.R.R. 115 (1911). The court below only rested its decision on this case, but its facts are different from those in the case at bar. Its reasoning is also different. In *Gonzalez*, at 125, it was held:

> "Notwithstanding the doctrine established by the Supreme Court of Spain and the opinion of the commentator, Manresa, we will decide this legal question in accordance with the principles well established in American jurisprudence; because in our opinion as judges we find the latter more in harmony with equity and justice and with the spirit of the law itself."

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on April 14, 1982, in case No. 0-81-479, *Duran Cepeda et al.* v. *Morales Lebron et al.*, the original of which, in Spanish, is under my custody in this Office.

IN WITHNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 30th day of July 1982.

/s/ Lady Alfonso de Cumpiano
LADY ALFONSO DE CUMPIANO
Chief Clerk
Supreme Court of Puerto Rico

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. R-75-369

HECTOR GIERBOLINI RIVERA, *et al.*,
Plaintiffs-Appellees,
v.
EMPLOYERS FIRE INSURANCE COMPANY,
Defendant-Appellant.

JUDGMENT FROM THE SUPERIOR COURT, SAN JUAN PART,
ANTONIO BAUZA TORRES, JUDGE

REVIEW

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, May 18, 1976

A friend invited Mr. Gierbolini Rivera to visit his home. At the request of his host, Mr. Gierbolini went to the yard of the house and sat on a wooden bench. One of the legs of the bench sank in the lawn and it collapsed on its side. As a result plaintiff-appellee, who then weighed 180 pounds and was 66⅓ inches tall, fell down. Mr. Gierbolini suffered a fracture of the coronoid apophysis of an elbow. The physiotherapy treatments he received have not led to a total rehabilitation.

The trial court concluded that "the bench was apparently safe and there was nothing to indicate the risk or danger which plaintiff might run upon sitting on the place to which he was led." Nevertheless, the Court deemed that "a dangerous situation had been created upon placing a bench on a soft surface such as the lawn after the rain had softened the soil's consistency", that "the visitor of a public establishment is entitled to suppose that due care has been exercised to provide a safe visit to the place" and that "We do not see any reason whatsoever why a different rule should be established for the visitor of a private residence."

Therefore, defendant was ordered to pay plaintiff several sums for different concepts, amounting to $16,265 plus costs, and $2,500 for attorney's fees. Defendant has appealed before us for the review of this judgment.

I

First of all, this case usefully emphasizes that, in Puerto Rico, and with very few exceptions provided by our legislation, the right to recover damages is governed by the Civil Law rules. The principles of the common law and of other juridical systems may be useful for a comparative study and sometimes for the development of domestic institutions. There are instances when the civil law and the common law actually converge in some aspects of this matter, or when it is desired that such convergence may take place. Di Prisco, Nicola, *Concorso di Colpa e Responsabilita Civile* 422 Napoli, 1973; Jardi, Enric, *La Responsabilitat Civil Derivada de l'Acte Il-licit* 114, Barcelona, 1958. On occasions, the same conclusion is reached by different means. However, damages issues cannot be solved behind the back of the civil doctrine applicable, although this does not mean that such doctrine is always the most adequate.

Situations like the one at bar are an example of the foregoing. The general trend is to decide them on the basis of the difference there used to be in Anglo-American law between the liability that is due to an invitee, a franchisee, or a licensee or a trespasser. *Goose* v. *Hilton Hotels*, 79 P.R.R. 494 (1956). This distinction is completely unknown, however, in civil law, and its importance in the Anglo-American law has remarkably decreased. In the specific case of the guest most of the North American case law still accepts the traditional terminology, but the latter is under a serious challenge. 2 *Statement of the Law Second, Torts* 378 *et seq.* (1956); Prosser, *Handbook of the Law of Torts* 378 *et seq.*, 4th ed. 1971. Several states arleady reject the consecrated classification of the guest. *Rowland* v. *Christian*, 443 P.2d 561 (Calif. 1968); *Kennev*

v. *Grice*, 465 P.2d 401 (Colo. 1970); *Peterson* v. *Balach*, 199 N.W.2d 639 (Minn. 1972); *Alexander* v. *General Accident Fire and Life Ins. Co.*, 98 So. 2d 730 (La. 1957); *Preston* v. *Sleziak*, 167 N.W.2d 477 (Mich. 1969). The Supreme Court of the United States classifies the difference between invitees and licensees as a vestige of feudalism. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 630-631 (1959). England has gone even further: the difference between invitees and franchisees has been repealed by law. *The Occupier's Liabilty Act 1957*, 23 Halsbury, *Statutes of England* 792 *et seq.* 3 ed.; Charlesworth, *On Negligence* 445-446, 4th ed., London, 1962. For the historical precedents of these concepts, see: Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. Rev. 182, 359 (1953).

In view of the increasing nonconformity in the Anglo-American law with the aforementioned differences, one cannot be surprised by the fact that in civil law regions where common law is deeply rooted, the doctrine refuses to willingly accept said contested concepts. 8 Nadeau, *Traite de Droit Civil de Quebec* 157 *et seq.*, Montreal, 1949. Likewise, in the case at bar it lies to examine the problem from the point of view of civil law.

II

Article 1802 of the Civil Code, 31 L.P.R.A. § 5141, provides that "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done...." This wide-ranging principle has generated intense discussions on the theory of fault since fault and negligence are faces of the same coin inasmuch as, in Manresa's words, "fault requires the execution of a positive act causing a damage to another person different from the one who executed it, and, in turn, negligence supposes an omission producing the same effect, although both have in common that the act be executed or the omission incurred without an injurious intent...." 12 Manresa, *Comentarios al Codigo*

Civil Espanol, 837, 6th ed., 1973. The logical strength of the concept of fault appears to be imposing. It seems to be a law of nature to say, as Andre Tunc states, that there is no liability without fault. However, Tunc and other importance commentators have extensively documented, the decadence which the concept of fault has been experimenting, in contrast to the process of continuous expansion of the concept of liability without fault. Tunc, Andre, *Fondements et fonctions de la responsabilite civile an droit francais*, published in Klein, Frederic-Edouard, *Colloque franco-germano-suisse sur less fondements et les fonctions de la responsabilite civile* 7 *et seq.*, Bale et Stuttgart, 1973; Viney, G., *Le declin de la responsabilite individuelle*, 1965, *passim*.

The theory of risk has undermined vital sectors of the former dominions of fault. It is necessary to specify the general contours of this erosion, insofar as the solution to the present controversy greatly depends thereon.

The theory of risk basically maintains that "Every person who through his activity creates a risk of causing damage to another person, should always be liable for this damage if it is produced, without the need of any personal fault." Orgaz, Alfredo, *La Culpa* 24-25, Buenos Aires, 1970. The theory of risk is also known as the theory of liability without fault, of the objective damage, of the created risk or the objective risk. Borrell Macia, *Responsabilidades Derivadas de Culpa Extracontractual Civil* 6 *et seq.*, Bosch ed., Barcelona 1942. With respect to its general nature, see: Traviesas, *La Culpa*, 13 *Rev. Der. Priv.* 273 (1926); Suss, *La evolucion de la responsabilidad por riesgo en el moderno derecho aleman*, 27 *Rev. Der. Priv.* 54, 137 (1943); Martinez Sarrion, *La responsabilidad objectiva como garantia patrimonial*, 50 *Rev. Der. Priv.* 117 (1966); Lawson, *Negligence in the Civil Law* 44 *et seq.*, Oxford, 1950. This doctrine has been acknowledged under specific circumstances in our country, but without entailing the rejection of the concept of fault. *Mendoza* v. *Cerveceria Corona*, 97

P.R.R. 487 (1969); *Rivera* v. *Caribbean Home Construction*, 100 P.R.R. 105 (1971). The same thing has happened in Spain with similar circumspection. Judgments of June 30, 1959, April 5 and 9, May 14 and October 30, 1963, June 15, 1967, May 11, 1971, May 29, 1972, and November 17, 1973; 12 Manresa, op. cit., at 840.

The theory of risk has extended to sectors of civil liability in France, Germany, Switzerland, the Scandinavian Countries, the socialist countries, and other regions. Andre Tunc, *op. cit.*, at 37. Nevertheless, it should be stressed that in civil law countries, the gradual and continuous expansion of this theory has in no way led to the total relinquishment of the requirement of fault. Fernandez Martin-Granizo, M.: *Los danos y la responsabilidad objectiva en el derecho positivo espanol* 94-96, Aranzadi ed., Pamplona, 1972. The doctrine's objection of such relinquishment is virtually unanimous. Yung, Walter, *Principes fondamentaux et problemes actuels de la responsabilite civile en droit suisse*, in Klein, *Colloque franco-germano-suisse*..., *supra* at 137.

According to some commentators the theory of risk generally covers activities which are the source of economic benefits for the author. Orgaz, A., *La Culpa* 25, Buenos Aires, 1970; Fernandez Martin-Granizo, *supra* at 108 *et seq.* *Ubi emolumentum, ibi onus.* Deutsch stresses the technical risk., Deeutsch, Erwin. *Mecanismes fondamentaux de la responsabilite civile en droit allemand*, in Colloque..., *supra* at 71. Tunc and others extend it to cover traffic accidents and damages which are collectively sustained. *Op. cit.* 25. The new Civil Code of Portugal gives a categorical solution to the problem in an obvious effort to arrest the development of the theory of risk by mere action of the courts. The new art. 483, second ordinal, provides: "In the absence of fault, compensation is obligatory only in cases specified by law." (Translation ours.) Civil Code, Imprensa Nacional de Lisboa, 1966.

A minor tendency, both in civil as well as in common law, aims at imposing liability whenever the damage caused stems from an act which permits the risk to be calculated and insured. II-II Puig Brutau, *Fundamentos de Derecho Civil* 69 (1956); Tunc, Andre, 1973, *loc. cit.*; 2 Harper and James, *The Law of Torts* 1477 (1956). We have not verified, however, under any of the described theories, that in the present state of the civil law the damage sustained by a guest has always to be compensated, whether fault is or is not involved. The theory of risk has not reached that frontier yet, although it is possible that it may invade it if the social and economical conditions eventually require it.

In this case, it is therefore inescapable to explore whether or not the host of the injured party incurred fault, inasmuch as the theory of risk is not applicable herein.

III

Before going any further we should set the standard to precisely determine the existence or absence of fault under these circumstances. The rule generally accepted is that there is fault when one does not act as a man of normal or ordinary diligence would, a good father of a family, according to the circumstances of the case. Judgment of December 22, 1928 (Spain); 12 Manresa, *op. cit.* at 849-850; Puech, Marc, *L'Illiceite dans la Responsabilite Civile Extracontractuelle* 52 *et seq.*, Paris, 1973; Rassat, *La Responsabilite Civile* 37, Paris, 1973; Visintini, G., *La Responsabilita Civile nella Giurisprudenza* 388, Padova, 1967; *Responsabilite du fait personnel*, 6 *Encyclopedie Dalloz*, 1975, par. 41; Orgaz, *La Culpa* 106 (1970). The modern trend conceives the fault as a social and objective concept, different from the former fault *in concreto*, where the capacity of the individual per se was considered. Rassat, *supra* at 37. The controlling factor is how a common and ordinary prudent man would have behaved in a similar situation. 6 *Encyclopedie Dalloz*, *supra*, paragraph 42. Hence, fault has a protean nature; it changes as the opinion

of men changes according to place and time factors. Fault, however, does not include the simple error of judgment, the simple oversights, the slight lapses which are part of human nature. XXXI Scaevola, *Codigo Civil* 296 (1961); IV-II Puig Pena, *Tratado de Derecho Civil Espanol* 575 (1951); Lombardi, La Responsabilidad Extracontractual Civil en el Derecho Panameno 76, Univ. of Panama, 1965, Tunc, Andre, *op. cit.* at 23-24.

As it can be seen, "fault" is such a malleable concept that the failure to exercise rigour thereof may even permit a surreptitious expansion of the theory of risk, leaving to the rule of fault the role of a mere eggshell. It would suffice to say that a particular damage may be foreseen by an ordinarily prudent man in order to project the no-fault liability concept towards a new sphere. This flexibility of the concept of "fault" is indeed desirable; otherwise, the law regarding tort liability would be enervated. On the other hand, the expansion should occur only after a frank and open discussion of the values at stake and the socioeconomical situation involved.

In this last sense many questions may arise. Which is the extent of insurance in the new field?[1] Does it suffice to have an isolated individual insurance or should a collective insurance be established for the more ample distribution of the risk? What social impact does a specific extension of the no-fault liability have on the system of values of the country in question? Up to what extent should the consideration of these problems be entrusted to the legislative power, as in the Portuguese civil law, at least, preferentially?[2]

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[1] No data on this matter is available at the Office of the Commissioner of Insurance of Puerto Rico.

[2] See what happened in the field of automobile and labor accidents. Automobile Accident Social Protection Act, No. 138 of June 26, 1968, as amended, 9 L.P.R.A. § 2051 *et seq.*; art. 404 of the Political Code, 3 L.P.R.A. § 422; Workmen's Accident Compensation Act No. 45 of April 18, 1935, as amended, 11 L.P.R.A. § 1 *et seq.*; Act No. 77 of June 23, 1958, 11 L.P.R.A. § 61 *et seq.*; Disability Benefit Act, No. 139 of June 26, 1958, as amended, 11 L.P.R.A. § 201 *et seq.*

In the case at bar, it is true that the bench remained on the lawn after the rain. However, the bench seemed to be safe, and there was nothing to indicate to the host and his guests the presence of a risk. We have not found under the civil law any case law or doctrinal statements, admitting that the behavior of the host in a case of this nature overweighs in such manner the rule of acceptable behavior for the common man under similar circumstances that liability should be imposed.

In view of the foregoing the judgment appealed from will be reversed.

Mr. Justice Torres Rigual, Mr. Justice Diaz Cruz, and Mr. Justice Negron Garcia concur in the result.

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on May 18, 1976, in case No. R-75-369, *Cierholini Rivera et al.* v. *Employers Fire Insurance Co.*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 1st day of December 1981.

Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

[SEAL]

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. R-78-367

JUSTO VALLE, ETC.
Plaintiffs and Appellees,
v.
AMERICAN INTERNATIONAL INSURANCE CO., AND GLORIA DINORAH DIAZ,
Defendants and Appellants.

REVIEW

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, May 22, 1979

The issues in controversy herein arise from a new aspect of our law in the field of damages: the consequences of a chain reaction collision of cars standing in a line.

Five vehicles were standing in line on the road in front of Levittown. The first two automobiles were waiting for right of way to turn to the left. The second car was driven by Justo Valle, plaintiff-appellee herein, and the third one by Gloria Dinorah Diaz, defendant-appellant. The other two cars were standing behind hers. The accident occurred when a sixth vehicle collided against the line of cars provoking a chain reaction collision. The force of the collision was such that Valle's automobile, the second in the line, was pushed from a distance of eight to ten feet against the vehicle ahead.

The driver of the second vehicle filed an action only against the driver of the third car. The trial court found that defendant's conduct was the proximate cause of the accident because "due to her negligence, she lost control of her vehicle and, besides, . . . she stood too close behind plaintiff's car. . . ." The findings of fact indicate that appellant's automobile was standing at a distance of from two to three feet behind Valle's

car. The trial court held appellant liable for the mental sufferings and bodily injuries sustained by Valle, for the damage to his vehicle, and for the mental sufferings sustained by his wife. We agreed to review.

1. *The applicable law.*

The Vehicle and Traffic Law of Puerto Rico, Act No. 58 of May 30, 1973, 9 L.P.R.A. § 301 *et seq.*, does not give us the key to the solution of the matters raised herein. Nevertheless, its history should be mentioned. Article 5-1108 of the Act, 9 L.P.R.A. § 1139, regulates the distance between moving vehicles. H.B. No. 583, which is the source of the Vehicle and Traffic Law, originally contained, in its art. 5-702, a provision which prohibited parking or standing a vehicle at a distance of less than three feet from another vehicle. The final version of this article, 9 L.P.R.A. § 1013(b)(1), makes no reference to the word "standing." See 27 *Diario de Sesiones*, Camara, 1670 (1937).

Aside from the importance of this fact in the light of the principles to be discussed later, and in the absence of specific legislation therefor, the rules applicable to this case are those stemming from the general law on damages.

Nowadays, it seems unnecessary to reiterate that, in Puerto Rico, the law in the field of damages is governed — both in form and in content — by the civil law system. But it has not always been so understood. Decisions and pronouncements to the contrary have not been expressly reversed nor contradicted.

In *Esbri* v. *Estate of Juan Serralles*, 3 P.R.R. 47, 91-93 (1902), it was stated that:

> "American doctrines and theories must control the courts of Porto Rico even in the construction of the laws of Spain, which are still found on the statute books of Porto Rico."

The decisions in *Marimon* v. *Pelegri*, 1 D.P.R. 225, 229 (1902), *Bravo* v. *Franco*, 1 D.P.R. 242, 244 (1902) revolved

around that same doctrine. A year later, the Court explained its opinion in *Chevremont* v. *People of Porto Rico*, 3 P.R.R. 215, 245 (1903):

> "We are always inclined to adduce the doctrines of American jurisprudence when applicable to judicial problems in the courts of this Island, considering them as more progressive, and as an evolution of the old system."

The grounds for these developments were laid two years before, in *Velez* v. *Ramirez*, 1 D.P.R. 199, 292 (1901), when the court refused to consider a judgment of the Supreme Court of Spain issued on February 23, 1899 "because it had been rendered after the extinction of [Spain's] sovereignty over this Island...."

In 1921, in view of the prevailing situation, a renowned scholar of the Anglo-American and other civil law systems made the following commentary:

> "In the Philippines and in Porto Rico there are many signs that common-law administration of a Roman code will result in a system Anglo-American in substance if Roman-Spanish in its terms."

R. Pound, *El Espiritu del "Common Law"*, translated by J. Puig Brutau, ed. Bosch, Barcelona, n. d., p. 18 [R. Pound, *The Spirit of "Common Law"* Boston, Marshall Jones Company, 1921, p. 2]. Pound's prophesy has not yet come totally true. In recent decades the Supreme Court of Puerto Rico has struggled to stop that trend, which started at the beginning of the century.

Consequently, all cases cited which tend to solve civil-law problems through common-law principles are reversed. In the appropriate cases, it shall lie to employ the common law in its multiple and rich versions — the Anglo-American, the original English, the Anglo-Canadian, and others — as a point of reference for comparative law, and the use of examples from other juridical systems shall also be permissible.

2. *Liability in cases of chain reaction collisions.*

This matter is not particularly regulated by our Vehicle and Traffic Law. Neither is it regulated by the Spanish Traffic Code, whose initial version was approved in 1934 and which, therefore, cannot be applied to Puerto Rico. J. de la Guardia Garcia, *Normas Legales de la Circulacion*, 2 ed., Ed. Aranzadi, Pamplona, 1974, *passim*. We have to resort to art. 1802 of our Civil Code, which is equivalent to art. 1902 of Spain.

We should mark a distinction between two types of chain collisions: the collision of a vehicle against moving vehicles, and the collision of a car against vehicles which are standing in line. This opinion deals exclusively with the second type.

This situation has not been discussed in Spain, at least as far as our research can show. However, the general principles governing it are well-known. As a rule, a causal nexus must exist between the wrongful act and the damage sustained. J. Santos Briz, *Derecho de Danos*, Rev. ed., *Derecho Privado*, Madrid, 1963, p. 223 *et seq*. By the same author, see also, 3 *Derecho Civil - Teoria y Practica* 578 *et seq*., Rev. ed., *Derecho Privado*, Madrid, 1973. In cases of concurrent causes we have to determine which is the efficient cause. In the first work cited, Santos Briz states: "When there are several concurrent causes, that which, in the circumstances, determines the damage, shall be deemed as decisive." (Judgment of January 30, 1954.)" *Op. cit.*, 225.

Spanish case law has repeatedly held that the causal relation can be interrupted (*causa interveniens*) by the irruption of an intervener; but in such a case, the impulse of his act must be conscious, intentional, or unlawful. The intervening act must also be foreign to the action. J. Santos Briz, *Derecho de la Circulacion* 188 *et seq*., Ed. Montecorvo, Madrid, 1976; *cf*. R. Rodiere, *La Responsabilite Civile* 179 *et seq*., Rosseau & Cie., Paris, 1952. Concert of actions may also break the causal nexus. *Santos Briz, loc. cit.* (1976).

The facts before us show that, pursuant to the above-cited rules, the driver of the third vehicle in the line cannot be held liable. The trial court found that the second vehicle, that of plaintiff, was pushed from a distance of eight to ten feet onto the car ahead. This necessarily indicates the force with which the sixth vehicle collided against the last car in the line. The third vehicle was not the efficient cause of the damages sustained by the second. The efficient cause was the manner in which the sixth car was driven, since that was the only car moving.

There was no intervening cause. Even if appellant's conduct had been wrongful, obviously it was not the determinant cause of the damage. Even if there would have been concurrent negligence, the decisive fault was that of the sixth car. We are not dealing either with a case of concert of actions. J. Santos Briz, *Derecho de la Circulacion*, *supra* at 192 *et seq.*

Although the Spanish civil law does not examine the specific cause of chain reaction collision under our consideration in this case, the Italian civil law, which is based on a later code, expressly decides the matter. The Italian Court of Cassation has recently decided that in controversies of this nature only the last vehicle is liable for the consequences of a chain collision between standing vehicles, because said car was the one which caused the collision. Cass., April 14, 1976, cited in G. Pescatore and C. Ruperto, *Codice Civile Annotato*, Ed. Giuffre, Milano, 1578, note on art. 2054 at 2047. See Z.R. Rovelli, *La Responsabilita Civili e Penali per gli Incidenti della Strada* 45 *et seq.*, Ed. Torinese, Turin, 1974.

In order to illustrate our point, we note that the North American viewpoint on this matter, although sometimes through different means, leads to the same results. In the United States the driver of the standing vehicle which is pushed against another is usually released from liability. *Peithman* v. *Beals*, 242 N.E.2d 476 (Ill. App. 1968). The usual practice there is to sue the driver of the vehicle which caused the first

collision. *Stephenson* v. *Wallis*, 311 P.2d 355 (Kan. 1957); *Vadnais* v. *Riskin*, 73 A.2d 813 (R.I. 1950); *Hill* v. *Bardis*, 69 A.2d 1 (N.H. 1949).

In view of the foregoing, the judgment below is reversed and the complaint dismissed.

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of the Act No. 87 of May 31, 1972) of the opinion rendered by this Court on May 22, 1979, in case No. R-78-367, *Justo Valle, etc.* v. *American International Insurance Co., etc.*, the original of which, in Spanish, in under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 1st day of December 1981.

Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

[SEAL]

IN THE SUPREME COURT OF PUERTO RICO

No. O-74-31

MANUEL FEBO ORTEGA, *et al.*,
Petitioners-Appellants,
v.
SUPERIOR COURT OF PUERTO RICO, SAN JUAN PART;
MANUEL REYES SERRANO, JUDGE,
Respondent.

CERTIORARI

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, September 10, 1974

An accident took place on October 3, 1972, gave rise to a complaint filed by appellants on September 20, 1973. Defendant was served with a summons on September 29 of said year, when the period of limitations had almost run out. Defendant filed his answer six days after the end of the one year period. His answer included a compulsory type of counterclaim, where it was alleged that plaintiff was the one who caused the accident.

Appellants then asked for the dismissal of the counterclaim on the grounds that it was time barred. The Superior Court refused to dismiss, and the decision was brought before us for review.

The matter with which we are dealing here has been the object of extensive consideration by courts in the United States, and outstanding commentators have written about the procedures currently used in them. The opinion advanced by most is that where there is jurisdiction because of the existence of a federal question, the filing of a complaint interrupts the statute of limitations in compulsory counterclaims. 6 Wright & Miller, *Federal Practice and Procedure* 109 (1971); 3 Moore, *Federal Practice* 13-848 (2 ed. 1974), n.6; *Azada* v. *Carson*,

252 F. Supp. 988 (D.C. Haw. 1966); *De Vito* v. *Hoffman*, 199 F.2d 468 (D.C. Cir. 1952); *Ash* v. *United States*, 363 F. Supp. 345, 346 (D.C. Neb. 1973). The rationale of this conclusion is that plaintiff is not prejudiced by the application of this rule because, presumably, he knows about the counterclaim or about the possibility of one and the witnesses and other evidence are equally available to both parties. Moreoever, the length of delay was under his control. The rule is usually derived from Rules 13(a), 13(f), and 15(c) of the Federal Rules of Civil Procedure, which are exactly equivalent to Rules 11.1, 11.6, and 13.3 of our Rules.

Since the rules applicable to this suit are identical to the federal ones, at first glance it seems that the controversy would be determined by the above. However, that is not the case. We are precisely before one of the situations where, due to an oversight, a question may be decided — instead of under our Civil Code — under institutions extraneous to said Code, thus accelerating its erosion and mongrelization. *Juanita Ward* v. *Tribunal Superior*, 101 D.P.R. 865 (1974); *Ortiz* v. *Levitt & Sons*, 101 D.P.R. 290 (1973); *Merle* v. *West Bend Co.*, 97 P.R.R. 392, 400 (1969); Puig Brutau, "La accion reciproca del derecho espanol y del derecho norteamericano en Puerto Rico," 44 *Revista de Derecho Puertorriqueno* 499 (1972).

The distinction between the substantive and the procedural is often faint and blurred, but not in this case. What is to be decided here is how and in whose behalf the statute of limitations may be interrupted, having in mind that the limitation of actions is not a procedural, but a substantive matter, with which our Civil Code specifically deals in arts. 1840-1874, 31 L.P.R.A. §§ 5261-5304.

Federal doctrine and case law acknowledge that, at least in cases of diversity of citizenship, federal courts should adhere to the statue of limitations governing in the jurisdiction in question. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); 6 Wright & Miller, *op. cit.*, 109. There are some who believe that this rule should apply to all federal cases. 3 Moore, *op. cit.*, 13-246, 13-247.

Therefore, we will examine the question under the body of civil law. The key article is art. 1873. It is equivalent to art. 1973 of the Spanish Civil Code, and reads as follows:

> "Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgement of the debt by the debtor."

Does the interruption allowed by this article where it refers to the filing of the case only benefit the plaintiff, or does it also allow the filing of counterclaims arising from the same transaction or event?

The most authoritative opinion is that the interruption arising from the filing of a complaint also favors the defendant counterclaimant when his action derives from the same facts that gave rise to the original complaint. XXXII-2 Scaevola, *Codigo Civil* 958-9 (1965). See also: I-2 Puig Pena, *Tratado de Derecho Civil* 444 (1958); XII Aubry et Rau, *Droit Civil Francais* 434-5, 6eme. ed. (par Esmein). This finds support in the old doctrine *Quae temporalia sunt agendum, perpetua sunt ad exceipiendum.*

It has also been pointed out that "It is inadmissible to raise the defense of limitations when — in accordance with his objective conduct and with good faith — he who raises it has led the opposing party to believe that the statute of limitation would not be invoked... For an abuse to exist, the conduct need not be geared to deceive and mislead the plaintiff into inaction.... The fact that it has objectively produced this belief in good faith will suffice." L. Diez Picazo, *La Prescripcion en el Codigo Civil* 57, (Barcelona, 1964). We are not stating that this is perforce the situation here, but we cannot close our eyes to the fact that in analogous circumstances, a potential defendant may believe that, with the passing of time, both parties have lost interest in the matter. To punish this defendant with the loss of the right he may have to file a compulsory counterclaim would amount to promoting the proliferation of slow and stealthy plaintiffs.

If we examine the true foundation of the statute of limitations, we end up on the same road. Some commentators think that the *raison d'etre* of the limitation of actions originates in a presumption of abandonment or relinquishment on the part of the plaintiff. Most of them find support for the doctrine on purposes of social need and utility, which require that suits must be instituted within the specified terms. I Castan, *Derecho Civil Espanol, Comun y Floral* 833 (11th ed. 1971). To allow counterclaims in situations like the present one is not contrary to this last purpose. What would offend our sense of justice would be precisely the contrary. The construction of our codes and statutes should not be governed by a logic blind to the aims and needs of our legal and social system, but by the opposite. On this last one depends, in the last instance, the ability of our statutes to tune in to social change and the faculty to update them within the bounds established by the lawmaker. Appellants' thesis could find support, at the most, on a mechanical application of the theory on the abandonment of actions, but not on reasons of social utility. Under these last ones, it would be impossible to reward lateness in the filing of an action in the manner prayed for here. By doing this, our proceedings would become traps for the unwary, instead of the simple and flexible instruments of justice they are supposed to be. See: *Garcia* v. *Government of the Capital*, 72 P.R.R 133 (1951), where, under another section of the Civil Code, it was held that the defense of limitations may not be raised in third-party complaints.

For the foregoing reasons, the order of the Superior Court will be affirmed.